

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

IN RE WASHINGTON MUTUAL  
MORTGAGE BACKED SECURITIES  
LITIGATION,

This Document Relates to: ALL CASES

MASTER CASE NO. CV09-037 MJP

**DEFENDANTS' MOTION TO SEAL**

NOTE ON MOTION CALENDAR:  
May 18, 2012

Defendants' Motion to Seal  
(CV09-037 MJP)

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Defendants WaMu Capital Corp. (“WCC”), WaMu Asset Acceptance Corp. (“WAAC”), David Beck, Diane Novak, Rolland Jurgens and Richard Careaga (collectively, “Defendants”) respectfully submit this Motion to Seal contemporaneously with their Motion to Exclude the Proffered Expert Testimony of Charles D. Cowan and Ira Holt.

## PRELIMINARY STATEMENT

Defendants respectfully request that the Court issue an Order sealing certain Exhibits to the Declaration of J. Wesley Earnhardt in Support of Defendants’ Motion to Exclude the Proffered Expert Testimony of Charles D. Cowan and Ira Holt (the “Earnhardt Declaration”), pursuant to Local Civil Rule 5(g), Paragraph 16 of the Stipulated Protective Order and Stipulated Order Regarding the “Clawback” of Documents (the “Protective Order”) (Dkt. No. 213) and applicable law.

Specifically, Defendants seek to seal Exhibits 6 and 7 to the Earnhardt Declaration, which contain non-public borrower-specific information—including borrower income, assets, employment history, credit history and other personal information obtained through borrower loan applications and prohibited from disclosure under the Gramm–Leach–Bliley Act (15 U.S.C. § 6801 *et seq.*).

## ARGUMENT

### **I. Legal Standard**

“Pursuant to Western District of Washington Local Rules CR 5(g)(2), the court may, for ‘good cause under [Federal] Rule [of Civil Procedure] 26(c)’ seal a document attached to a nondispositive motion.” Cell Therapeutics, Inc. v. Lash Group, Inc., No. 07-0310, 2011 WL 1930603, at \*4 (W.D. Wash. May 18, 2011); Martin v. Twin City Ins. Co., No. 08-5651, 2010 WL 742564, at \*1 (W.D. Wash. Feb. 26, 2010) (Rule

26(c) “provides that a court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”).

“A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted.” Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003) (citing Beckman Indus., Inc. v. Int’l Ins. Co., 966 F.2d 470, 476 (9th Cir. 1992) (“Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test”).) District Courts have “much flexibility in balancing and protecting the interests of private parties” under Rule 26(c). Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006).

## **II. Exhibits Containing Confidential Borrower Information Should Be Sealed Under the Gramm–Leach Bliley Act and the Protective Order**

Exhibits 6 and 7 to the Earnhardt Declaration are spreadsheets containing data generated by Plaintiffs’ proposed re-underwriting expert, Mr. Holt, and his team during their review of a sample of 424 loans that underlie the securitizations at issue. (Declaration of Michael A. Paskin in Support of Defendants’ Motion to Seal (“Paskin Decl.”) ¶ 2.) As such, the data purports to summarize and reflect loan-level information obtained directly from the relevant loan applications submitted by borrowers and the loan files generated in connection with those applications. (Id. ¶ 3.) This includes, among other things, sensitive nonpublic personal and financial information about individual borrowers, including borrower income, assets, employment history, credit history and other personal information. (Id.) Accordingly, Defendants designated the loan files that served as a source of the data in Exhibit 6 and 7 “Confidential” pursuant to the Protective Order when they produced them in this litigation. (Id. ¶ 4) While Exhibits 6 and 7 do not contain borrower names, the loan numbers they do contain potentially could be used to

1 match the personal and financial information contained therein to individual borrowers.

2 (Id. ¶ 5.)

3 Defendants are required to maintain the confidentiality of such  
 4 information under the Gramm–Leach–Bliley Act (15 U.S.C. § 6801 et seq.), which states  
 5 that “each financial institution has an affirmative and continuing obligation to respect the  
 6 privacy of its customers and to protect the security and confidentiality of those  
 7 customers’ nonpublic personal information.” 15 U.S.C. § 6801(a); see also Order on  
 8 Defs.’ Mot. to Seal (Dkt. 266), at 2. Nonpublic information is defined as “personally  
 9 identifiable financial information—(i) provided by a consumer to a financial institution;  
 10 (ii) resulting from any transaction with the consumer or any service performed for the  
 11 consumer; or (iii) otherwise obtained by the financial institution.” 15 U.S.C. §  
 12 6809(4)(A). As the Court stated in the Order on Defs.’ Mot. to Seal (Dkt. 266), common  
 13 examples of such information would be:

- 14 (A) Information a consumer provides to you on an application to obtain  
a loan, credit card, or other financial product or service;
- 15 (B) Account balance information, payment history, overdraft history,  
and credit or debit card purchase information;
- 16 (C) The fact that an individual is or has been one of your customers or  
has obtained a financial product or service from you;
- 17 (D) Any information about your consumer if it is disclosed in a manner  
that indicates that the individual is or has been your consumer;
- 18 (E) Any information that a consumer provides to you or that you or  
your agent otherwise obtain in connection with collecting on, or  
19 servicing, a credit account;
- 20 (F) Any information you collect through an Internet “cookie” (an  
information collecting device from a web server); and
- 21 (G) Information from a consumer report.

22 Order on Defs.’ Mot. to Seal (Dkt. 266), at 2-3 (citing 16 C.F.R. § 313.3(o)(2)(i)).

23 Similarly, the Protective Order in this case specifically provides for  
 24 confidential treatment of the very type of “sensitive personally identifiable” information  
 25 at issue in Exs. 6 and 7:

[A] disclosing party may designate as “CONFIDENTIAL” non-public personal information, or other sensitive personally identifiable information (such as Social Security numbers, dates of birth, home addresses, phone numbers, email addresses and those categories of information identified in Local Rule 5.2(a)) or other information for which applicable federal or state law requires confidential treatment.

(Protective Order at ¶ 5.)

Both Exhibits 6 and 7 contain this sort of nonpublic personal consumer information. This information is expressly protected under the Gramm–Leach–Bliley Act and the Protective Order. As such, these exhibits should be sealed in their entirety. Because of the voluminous nature of the personal information contained in these exhibits (and the fact that these exhibits are native Excel spreadsheets), it would not be feasible to redact the confidential information at issue. Nor would any such attempt yield a redacted version of the document that would be useful to the public in evaluating the substance of the Court’s decision on Defendants’ Motion to Exclude the Proffered Expert Testimony of Charles D. Cowan and Ira Holt.

### CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, Defendants respectfully request that the Court grant this Motion to Seal.

DATED this 25th day of April 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of April 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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